

Ethical Issues in Drug Court

- Brian Lukasavitz

Confidentiality

- HIPAA – 42 CFR (part II)
- Consent/Releases

Conflict of Interest

- Rules of Professional Responsibility
- Canons of Judicial Ethics

Confidentiality

- Judges – ex parte communication/ formal requests for information
- Defense attorneys – Attorney/client privilege
- Prosecution – Jeopardizing cases
- Probation – Local Policy
- Law-enforcement – jeopardizing investigations/Confidential Informants
- Treatment – HIPAA/ 42 CFR part II

Confidentiality

- Information regarding a person's substance abuse history is federally protected to encourage those needing treatment services to seek services without fear of the stigma that often accompanies chemical dependency.

- The goal of confidentiality rules are to protect those seeking treatment from having sensitive information released in a harmful way.
 - One goal of Drug Courts is to more efficiently provide relevant information to assist participants to receive services and to assist with monitoring.
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- These are not mutually exclusive!!!!

- The key to making this work is TRUST!!!

HIPAA/ 42 CFR (part 2)

Mandatory Reporters

Rules of Professional Responsibility

Confidential Informants/ Investigations

Canons of Judicial Ethics

- HIPAA – Federal rules regarding ALL health related information
- 42 CFR (part 2) – The AOD treatment confidentiality rule

HIPAA

- Health Insurance Portability and Accountability Act of 1996
- Designed to ease and ensure maintenance of health insurance coverage when changing employment.
- Designed to simplify and standardize the complexity of administrative information management.
- Protect and secure patient confidential information

HIPAA

1.) Information that identifies the client

2.) Health Information

- Any information that is oral, written, electronic created or received by health care provider, health plan, public health authority, employer, insurer or others
- Any information pertaining to past, present or future physical or mental health status, health care and payment for such services.

HIPAA

- Disclosure/Re-disclosure
 - Forbidden with the exceptions
 - Consent
 - Re-disclosure requires statement regarding release of information
 - “Court-order” (warrants and subpoenas are NOT sufficient)
 - Is the individual a client? Consent? *The burden is on the organization not to disclose client information.*

HIPAA – Common violations

- Inappropriate management of ID/Password, equipment:
 - Leaving computer/paperwork accessible
 - Sharing ID/password
 - Posting of passwords
 - Disregard for privacy
 - Lacking proper security safeguards
 - Insufficient releases

42 CFR – part 2

Imposes restrictions upon the disclosure and use of patient records that are maintained in connection with the performance of ANY federally assisted AOD program.

Does this apply to our Drug Court?

42 CFR (part 2)

- 42 Code of Federal Regulations – Part II
- First issued in 1975, revised in 1987
- To address the stigma of seeking treatment services for chemical dependency
- Requires; notification of confidentiality, consent /release forms and prohibition of re-disclosure
- “I cannot acknowledge whether someone is or is not in our program”

HIPAA vs. 42 CFR

- The laws cover the same material, 42 CFR part 2 specifically applies to chemical dependency.
- When there are inconsistencies – more recent and more specific rule applies.

Consequences/Liability

- Violations of 42 CFR may result in the following:
 - Individual fines of up \$500. for first offense, up to \$5000. per year for subsequent offenses.
 - Loss of Federal Funding for programs
 - Program and individual may lose licensures and certifications

Consent/Releases

- A proper consent can authorize all parties involved in the drug court to share information necessary to monitor treatment progress and compliance.
- To be effective the consent form should be signed “early and often”

Consent/Releases

- HIPAA prohibits a program from conditioning treatment on a patient signing a consent or release of information form, HOWEVER
- The judge, probation/parole, social services can condition participation in the drug court on signing such a consent. Participant always has the option of not participating in the program, they may just prefer drug court to other alternatives.

Consent Forms

- Signed early and often and must be in writing
- Nine elements of “proper” consent:
 1. The specific type of information being disclosed
 2. The purpose of the disclosure
 3. Who is authorized to make disclosures
 4. Who is authorized to receive disclosures
 5. Identity of participant/client
 6. His/her signature (parent/authorized person)
 7. Date of consent
 8. Expiration of consent
 9. **Right to revoke**

Consent Forms

- Consent should be “knowing and voluntary”, and may be deemed invalid.
 - Voluntary is sufficient when alternative options of not participating in Drug Court are less appealing
 - Participant should be allowed to consult with an attorney prior to signing.
 - Participant should have the consent explained to them in detail (attention should be paid to literacy, comprehension and/or language barriers)
 - Participants should be informed (orally and in writing) that their privacy rights are federally protected.

Attorney - Client Privilege

- Rule 1.6: Confidentiality of Information
- A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in Paragraph B (prevent imminent death or substantial bodily harm or to allegations)

Duty of Confidentiality (Def. Atty)

- 4-3.1: Establishment of Relationship
- Defense Counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal. Defense Counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

Duty of Confidentiality (Prosecutor)

- Like Defense Counsel, a prosecutor owes Drug Court participants a duty of confidentiality. This duty arises not out of Rules of Professional Responsibility, but rather out of State and Federal guidelines protecting information about a participant's AOD treatment.
- Drug Court Policies/ MOU's

MN Mandatory Reporting

- **Ann. Stat. § 626.556, Subd. 3:** (sexual/physical abuse or neglect of child)
- Mandatory reporters include: A professional or professional's delegate who is engaged in the practice of the healing arts, hospital administration, psychological or psychiatric treatment, child care, education, social services, correctional supervision, probation or correctional services, or law enforcement
- A member of the clergy who received the information while engaged in ministerial duties

Criminal Investigation

- Confidential Informants
- Compromise of on-going investigations

Test Question #1

- A client has absconded from IP treatment, after it is learned by the provider that the client has used that day while in treatment. Not knowing whether or not a proper release has been signed by the client, the provider contacts their probation officer...is this a violation??
 - A. Yes
 - B. No – Drug Court participants always sign waivers!!!!
 - C. No – The participant has violated terms of probation
 - D. No – This falls within the definition of emergency exception.

Conflict of Interest

Conflict of Interest

Defense Counsel

- Adverse Clients
 - Representation of multiple clients in Drug Court rarely creates a situation prone to a conflict of interest generally. Client's interests are rarely directly adverse to each others. (full disclosure/consent/ separate counsel)
 - Co-Defendants in criminal case
 - One participant accuses another of lying, using, selling, etc.
 - Termination/ Execution of Sentence

Attorneys

- The paradigm shift for attorneys is probably the most significant change among team-members.
- Attorneys **MUST** be willing to shed their adversarial courtroom relationship, and focus less on the legal aspects of a particular case and more on the facilitation of an individuals progress in treatment.

Conflict of Interest

Rule 1.7: Conflict of Interest

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - 1. the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - 2. Each client consents after consultation
 - (Co-defendants/ outside counsel)

Conflict of Interest

- Team-membership and Collaboration
 - Appearance of Conflict of Interest
 - Courtroom as a theatre

Conflict of Interest

- ABA Standards for Criminal Justice
- Standard 4-3.5: Conflict of Interest
 - Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property or personal interests

Conflicts of Interest

- ABA Standards for Criminal Justice
- Standard 3-1.3: Conflicts of Interest
 - A prosecutor should avoid a conflict of interest with respect to his or her official duties.
 - A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

Counsel as “Advisor”

- In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

Rule 3.3: Candor toward the Tribunal

- (A.) A lawyer shall not knowingly:
 - 1. Make a false statement of material fact or law to a tribunal;
 - 2. Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
 - 3. fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - 4. offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

- This Rule prohibits a lawyer from deceiving the court!!!!
- Example: A client informs counsel of “use”, but the use is undetected.
 - Neither client nor attorney is obligated to disclose this fact. HOWEVER, Rule 3.3 imposes a duty of candor that supercedes the lawyer’s duty of confidentiality.

Cont'd

- As in traditional courtrooms, defense counsel should always encourage a client to be honest. (Honesty is a critical element to a client's recovery and successful completion of the drug court).
- TEST QUESTION?????

Test question #2

- What should counsel do?????
 - A. Advise client to be honest...emphasizing the benefits of honesty and possible consequences of lying/perpetrating fraud on the court.
 - B. Seek to withdraw from representing client.
 - C. Disclose client's fraud/Demand client's honesty.
 - D. Nothing

- ABA Standards for Criminal Justice
- Standard 4-5.1: Advising the accused
- (a.) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.
- (b.) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

- Prosecutors – Criminal Justice 3-3.1 (f), forbids prosecutors to “promise not to prosecute for prospective criminal activity”

Competence vs. Zealous Advocacy

- Rule 1.1: Competence
 - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
 - Some aspects of representation seem to be significant departures from traditional criminal representation (i.e., client/judge direct communication)

Diligent Representation

- Rule 1.3: Diligence
 - A lawyer shall act with reasonable diligence and promptness in representing a client.
 - Diligent and Competent Representation is crucial in Drug Court representation, however the primary goal of counsel is to advise clients and protect their rights...this does not mean challenging every sanction, when the goal of the sanction is to support the client's recovery and the sanction is within the range of those sanctions imposed on other participant's similarly situated.

“Zealous Advocacy”

- While “public safety”, “accountability” “protection of due process rights and equal protection rights” must remain hallmarks of the prosecution and defense attorney’s philosophies, it is the focus on the bigger picture that must remain the priority.

- Rule 3.1: Meritorious claims and contentions

- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

- Best Interest of the client may require establishment of all elements, however, ethical responsibility also includes advising clients to what will best serve their interests towards sobriety, avoiding sanctions regarding honesty, as well as counter-productive legal arguments impeding success with progress in treatment and Drug Court.

Ex Parte Communications (MN)

- A new Comment 4 added to the prohibition on ex parte communications (Rule 2.9A) in the 2007 ABA Model Code states:
 - A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

Judicial Ethics and Drug Courts

Judge Kevin Burke